

ADVISORY OPINION 93-028

Any advisory opinion rendered by the registry under subsection (1) or (2) of this section may be relied upon only by the person or committee involved in the specific transaction or activity with respect to which the advisory opinion is required. KRS 121. 135(4).

December 12, 1993

:

Mr. Hal Nance Bogard, Esq.
Brown, Todd & Heyburn
3200 Capital Holding Center
Louisville, Kentucky 40202-3363

Dear Mr. Bogard:

Thank you for contacting the Registry. For the record please note that the Registry realizes you are an attorney with the Kentucky law firm of Brown, Todd & Heyburn. Further, two (2) members of the Kentucky Registry of Election Finance are members of your law firm. Therefore, other than to notify these members that a member of their law firm has tendered an advisory opinion request, no Registry staff members or employees have consulted with the Brown, Todd & Heyburn Registry members regarding your advisory opinion request.

The facts to your question are best set forth by quoting your letter and paraphrasing it as follows:

[Your client] owns a coal company in Madisonville and is part owner of a company seeking a permit to operate a solid waste landfill in Hopkins County. For the last three years, Danny Woodward and Karol Welch, both also of Madisonville, have made public statements against [your client] and his business activities.

Earlier this year, Mr. Woodward became a candidate for Hopkins County Judge and Ms. Welch became a candidate for Hopkins County Magistrate. During their election campaigns, both candidates (particularly, Ms. Welch) continued to make statements against [your client], and his coal company and the proposed landfill.

In late October, [your client] finally decided to respond to publicly to certain of Mr. Woodward's and Ms. Welch's statements. Without collaborating (directly or indirectly) with any candidate or group, [your client] purchased advertising space in the Madisonville Messenger and openly expressed ideas contrary to those of Mr. Woodward and Ms. Welch... (See Advisory Opinion Request letter, emphasis added).

You have conditionally tendered KREF 92-013, a standard Kentucky Registry of Election Finance form for reporting independent expenditures as defined by KRS 121.150(1). The conditionally tendered report lists the three above-referenced advertising expenditures as being made on October 25, 27, and 28, 1993. Your client spent a total of \$929.25 on these advertising messages.

Based on these facts, your questions can be stated as follows:

Does KRS 121.150(1) require one to report an independent expenditure where the spender makes the advertising expenditure close in time to an election, the content of the advertising opposes the views of candidates in the election, and the content of the advertising does not literally denounce the candidacies of those mentioned in the ads?

KRS 121.150(1) defines an "independent expenditure" as:

"Independent expenditure" means one (1) made for a communication which expressly advocates the election or defeat of a clearly identified candidate or slate of candidates, ...Any person making an independent expenditure as defined in this subsection, shall report these expenditures when the expenditures exceed \$500 in the aggregate in any one election on forms provided by the Registry. Id. (Emphasis added).

The issue created by the facts in your question is whether or not printed political speech necessarily must contain literal words such as "Do not vote for" in order to constitute "expressly advocating" the defeat of two clearly identified candidates. The answer to your question is no, printed political speech need not contain literal language such as "Do not vote for" in order to expressly advocate the defeat of two identified candidates for political office in Kentucky. Buckley v. Valeo, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) stands for the proposition that the federal election laws may require reporting of an independent expenditure above \$250 without violating the first amendment rights of the person making the independent expenditure. The Kentucky definition of independent expenditure, and the Kentucky reporting threshold is \$500 in any one election. The expenditure made by your client meets the test so far.

In Federal Election Commission v. Furgatch, 807 F.2d 857 (9th Cir., 1987), the court decided that literal language is not necessary for a paid advertisement to expressly advocate the defeat of a candidate for federal office. In deciding whether or not the questioned printed political speech expressly advocated the defeat of a candidate, the Furgatch court set forth the following test:

We conclude that speech need not include any of the words listed in Buckley [literal advocacy words] to be expressed advocacy under the act, but it must, when read as a whole, and with limited reference to external events, be susceptible of no other reasonable interpretation as exhortation to vote for or against a specific candidate. Id.

The Furgatch court noted that Mr. Furgatch had run his ad advocating the defeat of President Carter on October 28, 1980, and November 1, 1980, and that nothing in Furgatch's ads [literally] expressly advocated President Carter's defeat for re-election in 1980.

The facts you have provided to the Registry, including the dates your client ran his advertisements in the newspaper, fit well within FEC v. Furgatch. The reported ads in question are "susceptible of no other reasonable interpretation but as an exhortation to vote...against...specific candidate[s]." Id., at 864. Therefore, the Registry will accept your client's report as timely filed and file the report.

This opinion is based upon the course of action outlined in your letter. If you should have any more questions, please give us a call. Thank you.

Sincerely,

Timothy E. Shull
General Counsel

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